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Supreme Court of the United States

October Term, 1971

No. 71 - 535

WILLIAM FREEDMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. .....

WILLIAM FREEDMAN,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, WILLIAM FREEDMAN, respectfully prays that a Writ of Certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 22, 1971.

OPINIONS BELOW

The Opinion of the Court of Appeals appears in Appendix "A" to this petition. It has not yet been published in the Federal Reporter series. No Opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The original judgment of the Ninth Circuit Court of Appeals was entered on June 22, 1971. A timely petition for rehearing was denied on July 15, 1971 (Appendix "B"). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the levy of a jeopardy assessment against unlawfully seized funds is violative of the Fifth Amendment to the United States Constitution in that it deprives petitioner of property without due process of law.

2. Whether the summary forfeiture of funds seized from criminal defendants can be countenanced in view of this Court's holdings in *United States v. United States Coin and Currency*[1] and *Sniadach v. Family Finance Corporation*[2].

3. Whether the administrative remedy provided by 26 U.S.C. § 7422 to challenge the validity of a tax assessment

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1. 401 U.S. ....., 91 S.Ct. 1041 (1971).

2. 395 U.S. 337 (1969).

is a viable or realistic remedy if a taxpayer cannot avail himself of it without the likelihood of self-incrimination.

4. Whether a jeopardy assessment levied against money seized from a criminal defendant is a constitutional exercise of the taxing power or rather an additional penalty exacted against one suspected of wrongdoing.

5. Whether the jeopardy assessment is tantamount to a forfeiture and is therefore penal in nature.

STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment IV–Searches and Seizures

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V–Due Process

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . ."

Title 26, United States Code, Section 6851(a):

§ 6851. Termination of taxable year.

(a) Income tax in jeopardy.—

"(1) In general.—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy."

Title 26, United States Code, Section 6861(a) and (b):

§ 6861. Jeopardy assessments of income, estate, and

gift taxes.

"(a) Authority for making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

"(b) Deficiency letters.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment."

Title 26, United States Code, Section 7422(a):

§ 7422. Civil actions for refund

"(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his

delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

STATEMENT OF THE CASE

On December 10, 1968, a secret indictment was returned against William Freedman by the Grand Jury for the Southern District of California, alleging a conspiracy to violate 21 U.S.C. §§ 173, 174 with Robert and Helen Hernandez. On December 17, 1968, agents of the Los Angeles County Sheriff's office and the United States District Director of Customs, pursuant to an arrest warrant issued out of the Southern District Court, broke into Freedman's home in Los Angeles, about 7:00 a.m., arrested him, and conducted an exploratory search of the several rooms of his duplex apartment. (RT[3] 15-18) No search warrant had been obtained by any government agent, state or federal. (RT 25-26) In fact, the United States Attorney in charge of the case in San Diego testified that he sought no search warrant in advance because he did not know what evidence, if any, would be found on the premises and whether or not it would be relevant to any criminal prosecution (RT 83).

Although Freedman was awakened in bed and immediately placed under arrest (RT 15), the officers proceeded to conduct a general search of the apartment's bedroom, den, kitchen, and living room, while Freedman was held under surveillance in the bedroom (RT 15-17). Agents even returned to the dwelling to search the garage on a subsequent day

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3. As used herein, "RT" refers to the Reporter's Transcript, "CT" to the Clerk's Transcript.

(RT 24, 25, 169).

Seized in the search were: two hand guns (found in a chest of drawers and wrapped in oily paper) (RT 176); assorted papers, books, and notes belonging to petitioner; and $13,000.00 in cash (CT 33), which was found after he was required to open a locked wooden box which the agents had removed from a closet (RT 20).

On or about February 13, 1968, a new "superseding" indictment was filed against Freedman in the Southern District of California, this time charging him with a massive conspiracy with some 50 other persons. (RT 76-78) This second indictment might well have been predicated on information unlawfully seized in the aforementioned search.

On April 16, 1969, Freedman filed a civil action in the Central District of California, the district wherein the search occurred, against the United States for the return of the money, note papers and books, under the authority of Rule 41 of the Federal Rules of Criminal Procedure.

On April 22, 1969, Freedman also filed in the same district a "Motion to Quash Search Warrant (If Any), To Suppress and Return Items Seized," under Rule 41, F.R.Crim.P.. This motion was given the same civil number as the prior complaint and concerned the same $13,000.00, address books and note papers set forth in that complaint, hereinafter referred to as *Freedman v. United States,* Civil No. 69-715-EC, 421 F.2d 1293 (1970).

A hearing was held on May 6, and the District Court in Los Angeles, in a purported exercise of its discretion, dismissed the complaint without prejudice and deferred the ruling on Freedman's motion to the District Court in San Diego, where the indictment was there pending. Freedman appealed

to the Ninth Circuit Court of Appeals, which remanded *per curiam* and ordered that an evidentiary hearing be held to determine whether there was any connection between the seized property and the criminal proceeding pending in San Diego.

On remand to the District Court in Los Angeles on March 11, 1970, the government conceded that the only items it considered relevant to the criminal trial in San Diego were government exhibits D (telephone bills), E (an IBM card), F (an address book), and the $13,000.00 (RT 184) (CT 33).

Petitioner's counsel, on the other hand, objected to any ruling on relevancy prior to a finding that the search was either lawful or unlawful (RT 139). The objection was overruled.

At the hearing, one government witness contended that the mere existence of a large cache of money in Freedman's apartment was proof of some kind of unlawful activity (RT 45), but then the government admitted that it did not intend to offer the money itself into evidence in San Diego but only oral testimony that Freedman had it in his apartment (RT 73).

The District Court found that government exhibits D, E, F, and the $13,000.00 were relevant to the San Diego trial and therefore declined to rule on the legality of the search, leaving that issue for the Southern District Court in the criminal proceeding (RT 191).

On May 1, 1970, William Freedman was convicted of conspiracy to smuggle, sell and conceal narcotics, but at that trial the government failed to introduce any evidence whatsoever that Freedman possessed $13,000.00 in his

apartment. The court ruled that the money was irrelevant and therefore inadmissible (RT 208) and therefore *refused* to rule on whether or not it should be returned to Mr. Freedman as the fruit of an unlawful search, although such motions were made (RT 203, 207) (CT 41, 42). The San Diego court, instead, referred the matter back to the Central District Court for disposition on that one remaining point.

Finally, on June 22, 1970, the District Court in Los Angeles reopened the civil matter of *Freedman v. United States.* This time the government moved to dismiss the complaint for return of unlawfully seized property, on the ground that the federal district courts no longer have jurisdiction over the matter (RT 209-215) because the money was turned over to the Bureau of Internal Revenue, which had levied a jeopardy assessment on the cash immediately after it was seized from Freedman by Customs agents. The government's theory was, and is, that the money is subject to "lawful detention" under Rule 41(e), F.R.Crim.P.; that 26 U.S.C. § 7422 precludes the exercise of jurisdiction by a federal court over a claim for a "tax refund" until a petition for refund has been filed and heard in a Tax Court; and that the money may not be returned even if unlawfully seized in the first place (RT 209-215) (CT 24-29). However, the government offered no evidence proving that it had complied with the requirements of 26 U.S.C. §§ 6851, 6861 (jeopardy assessments) other than the hearsay declarations of the United States Attorney and an affidavit of an agent of the Bureau of Internal Revenue (RT 215-217) (CT 31).

Petitioner, on the other hand, reasserted that the only relevant issue to be decided was still whether or not the search was lawful and that if the money was seized unlaw-

fully, then it may not be used *for any purpose whatsoever* and must be returned. The court may not inquire whether it is subject to "lawful detention" (RT 205). Furthermore, even if the search were deemed lawful (though the government had admitted by its pleadings that it was not lawful) (CT 11-15), the levy was not lawfully noticed or assessed (CT 41).

The District Court for the Central District of California again declined to rule on the legality of the search but dismissed the complaint and granted summary judgment to the United States, citing 26 U.S.C. § 7422 as depriving it of subject matter jurisdiction (CT 56-60) (RT 224-225). The Ninth Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

A. Introduction.

The time has come to re-evaluate the statutory procedures whereby the government may summarily deprive persons of their property without first providing notice and hearing. This Court has not been loath to address that issue in recent years, and petitioner submits that this case arises as the natural progeny of *Sniadach v. Family Finance Corporation,* 395 U.S. 337 (1969), and *United States v. United States Coin and Currency,* 401 U.S. ....., 91 S.Ct. 1041 (1971), and broadening concepts of procedural due process.

B. Points and Authorities.

As reasons for granting the writ, petitioner submits:

1. **A jeopardy assessment results in the *forfeiture* of seized funds, because the claimant cannot challenge the seizure and defend his property without the likelihood of self-incrimination.**

The federal circuit courts have, without exception, endorsed the Bureau of Internal Revenue's current practice of levying against seized moneys; this is so even if the money was seized illegally. *Ginsburg v. United States,* 408 F.2d 1016, 1017, fn. 1 (9th Cir. 1969); *Field v. United States,* 263 F.2d 758 (5th Cir. 1959), *cert. denied* 360 U.S. 918 (1959); *Welsh v. United States,* 220 F.2d 200 (D.C. Cir. 1955); *Carlo v. United States,* 286 F.2d 841 (2d Cir. 1961), *cert. denied* 366 U.S. 944 (1961). The taxpayer may challenge the legality of the assessment only by filing a claim with the Bureau via 26 U.S.C. § 7422. The burden of proof is then upon the claimant to prove that the assessment was not lawful; obviously, to do so, he must establish that the money was not gained from unlawful activities. Thus, the criminal defendant cannot pursue the remedy without the likelihood of self-incrimination. Faced with this dilemma, he chooses not to contest the assessment. This is precisely the kind of forced "choice" condemned in *Boyd v. United States,* 116 U.S. 616 (1886), and *Garrity v. New Jersey,* 385 U.S. 493 (1966).

Simply stated, the situation is such that because the taxpayer is suspected of unlawful activities, the government may literally steal money which it believes to be the fruit of those activities. To say that a jeopardy assessment is not a "forfeiture" is to ignore practical reality.

2. **The District Court assumed, and the Court of Appeals conceded, that the search of petitioner's apartment was violative of the Fourth Amendment. Evidence seized in an unlawful search cannot be used to sustain a forfeiture.**

> *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 691 (1964).
>
> "The essence of the rule forbidding the acquisition of evidence through an unlawful search is not merely that evidence so acquired shall not be used in a criminal prosecution, but that such evidence shall not be used *for any purpose whatsoever.*" (Emphasis supplied.)
>
> *Fahy v. Connecticut*, 375 U.S. 85 (1963).

The holding of *Fahy* would seem to preclude the levying on unlawfully seized funds. Thus, it stands in stark contrast to the circuit courts holdings in *Ginsburg, Field, Welsh* and *Carlo, supra.*

3. **Forfeitures are penal in nature because they seek to punish those accused of crime.**

This Court noted in *United States v. United States Coin and Currency*, 401 U.S. ....., 91 S.Ct. 1041 (1971), that:

> "From the relevant constitutional standpoint there is no difference between a man who 'forfeits' Eight Thousand Six Hundred and Seventy-four doliars ($8,674.00) because he has used the money in

> illegal gambling activities and a man who pays a 'criminal fine' of Eight Thousand Six Hundred and Seventy-four dollars ($8,674.00) as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force."
>
> *United States v. United States Coin and Currency*, 401 U.S. ....., 91 S.Ct. at 1043.

Furthermore, the Court in *Coin and Currency* recognized that the statutory procedures for challenging the propriety of the forfeiture can be pursued by a claimant only at great risk to himself. In order to challenge the forfeiture civilly, the claimant must provide information which will incriminate him. The result is that criminal defendants do not resort to their statutory "Right" to challenge a forfeiture, because the "price" is entirely too high. Therefore, this Court held that the Fifth Amendment privilege may be invoked in such forfeiture proceedings so as to defeat the government's claim.

4. Summary seizure of property violates the Fifth Amendment's guarantee of procedural due process in the absence of extraordinary circumstances.

Since this Court rendered its decision in *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), the Fifth Amendment's guarantee of procedural due process has been expanded to encompass a host of newly recognized

and critical property rights. *E.g., Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Boddie v. Connecticut*, 401 U.S. 371 (1971). On August 26, 1971, the Supreme Court of California, on the strength of *Sniadach*, invalidated California's statutory scheme allowing prejudgment attachments of debtors' property. *Randone v. Appellate Department of the Superior Court of Sacramento County*, 5 Cal.3d ..... (1971) (unreported at the time of preparation of this petition). That holding was grounded on the principle that a summary taking of property can be reconciled with procedural due process only in "extraordinary situations" where the government can demonstrate a legitimate need to protect itself or its citizens. The California Supreme Court cited *Boddie v. Connecticut, supra*, with approval and said:

> " . . . 'Absent a countervailing State interest of overriding significance' (401 U.S. at p. 377), due process requires, at a minimum, that an individual be given a meaningful opportunity to be heard prior to being subjected by force of law to any significant deprivation."

The Court in *Randone* took pains to cite examples of "extraordinary situations": *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950) [seizure of misbranded drugs where public health is of paramount importance]; *Fahey v. Mallonnee*, 332 U.S. 245 (1947) [seizure of control of bank to prevent precipitous failure].

Jeopardy assessments purportedly protect the interest of the government in taxable revenue. The government taxes suspected criminals by seizing any money in their possession at the time of arrest. Petitioner does not contend that criminal enterprises are, or should be, tax exempt; only

that the government may not itself resort to illegal conduct for the purpose of collecting that tax.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

Respectfully submitted,

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MARKS, SHERMAN & SCHWARTZ

A Professional Corporation

Attorneys for Petitioner

APPENDIX

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals, for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, vs. WILLIAM FREEDMAN, Appellant.

No. 26,566.

[June 22, 1971]

Appeal from the United States District Court, Central District of California.

Before: MERRILL, HUFSTEDLER and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge:

This is an appeal from an order of the district court denying appellant's Rule 41(e), FRCrimP, motions for the return of property wrongfully seized.

FACTS

Inasmuch as substantially all of the essential facts are stated in the opinion on the previous appeal, *Freedman v. United States*, 421 F.2d 1293 (9th Cir. 1970), we shall limit our statement to the bare essentials.

Following the seizure of appellant's property in the criminal proceeding, including the $13,100.00 here in question, the Commissioner of Internal Revenue, on December 23, 1968, caused an assessment to be made against the appellant for income taxes in the sum of $13,953.50 for the taxable year ending December 17, 1968. On the same date, the Commis-

sioner levied on the $13,100.00 previously seized in the criminal action, by serving a "Notice of Levy" on the United States Customs Service which was in possession of the money. On January 9, 1969, the Commissioner took possession of the $13,100.00, converted it into the form of a certified check and posted a credit in that amount to the account of the taxpayer. Rule 41(e) procedures for return of the money, and other property not here in question, were instituted by appellant on April 16th and April 22nd, 1969.

In the hearing on the remand from the previous appeal, the government agreed to a return of all of the properties, with the exception of the $13,100.00, and three other items which it considered relevant as evidence in the criminal case. The district court for the Central District of California, in the exercise of its discretion, again referred the suppression motions to the Southern District of California, holding that there was sufficient connection between the four remaining items, including the $13,100.00 and the case in the Southern District, to warrant such action. The district court for the Southern District denied taxpayer's motions as to the items other than $13,100.00 and referred the motions on that item back to the Central District. On May 1, 1970, the appellant was convicted in the Southern District of the crime of conspiracy to violate the narcotics laws, 21 U.S.C. §§ 173, 174. Appellant then renewed his motion in the Central District for the return of the $13,100.00. There, as here, the government contended that appellant's Rule 41(e) procedures were only a camouflage, and that they, in fact, were actions for a refund of the tax assessed by the Commissioner. That being so, and since appellant did not file a claim for a refund or for a credit with the Commissioner pursuant

to the provisions of 26 U.S.C. § 7422(a),[1] the district court held that it had no power to proceed. We agree.

CONCLUSIONS

Regardless of form, an absolute prerequisite to the maintenance of such an action is the filing of a claim for refund or for a credit pursuant to § 7422(a). *Thompson v. United States,* 308 F.2d 628, 634 (9th Cir. 1962); *Owen v. United States,* 277 F.2d 790 (9th Cir. 1960). The fact that the seizure of the fund may have been illegal is of no significance. *Ginsberg v. United States,* 408 F.2d 1016, 1017, fn. 1 (9th Cir. 1969); *Simpson v. Thomas,* 271 F.2d 450 (4th Cir. 1959); *Field v. United States,* 263 F.2d 758 (5th Cir. 1959), *cert. denied* 360 U.S. 918 (1959); *Welsh v. United States,* 220 F.2d 200 (D.C. Cir. 1955). The salient facts in *Field* are indistinguishable from those before us. In accord, under a similar state of facts, is *Carlo v. United States,* 286 F.2d 841, 849 (2d Cir. 1961), *cert. denied* 366 U.S. 944 (1961). Both *Field* and *Carlo* are cited with approval in the footnote to *Ginsberg.*

The lower court assumed that the original seizure was unlawful, but denied relief on the theory that the validity of the levy for income taxes had to be tested in procedures properly prosecuted under the Internal Revenue Laws. In the arguments before us, the government claimed no right to retain the money on the basis of its original seizure and conceded that appellant would be entitled to a return in appropriate proceedings, of so much of the fund as might not be subject to the tax levy. (All or any part). Accordingly, we so hold.

This holding exhausts the subject matter of the present litigation. We leave open to the appellant all issues surrounding the propriety of the tax levy with the right to pursue such

[1] Section 7422(a) of the Internal Revenue Code of 1954.

other remedies as may be available to him for a determination of the validity of such levy.

AFFIRMED.

■

APPENDIX "B"

ORDER DENYING REHEARING

In the United States Court of Appeals, for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, v. WILLIAM FREEDMAN, Appellant.

No. 26566

[Filed July 15, 1971]

Appeal from the United States District Court, Central District of California.

ORDER

Before: MERRILL, HUFSTEDLER and KILKENNY, Circuit Judges.

The petition of appellant for rehearing in the above entitled cause is DENIED.

■

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on October 10th, 1971, I served the within PETITION FOR WRIT OF CERTIORARI (FREEDMAN v. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543
[3 copies]

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR
UNITED STATES COURTHOUSE
LOS ANGELES, CALIFORNIA 90012
[3 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 10th, 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 322 Main St., Huntington Beach, Calif.
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